

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HIDDEN HILLS MANAGEMENT,
LLC, and 334th PLACE 2001, LLC

Plaintiffs,

v.

AMTAX HOLDINGS 114, LLC, et al.,

Defendants.

CASE NO. C17-6048 RBL

ORDER ON MOTIONS FOR
SUMMARY JUDGMENT

THIS MATTER is before the Court on the following dispositive motions: Plaintiff 334th Place 2001's Motion for Summary Judgment [Dkt. #52]; Defendant Amtax Holdings' Motion for Summary Judgment [Dkt. # 62] and Plaintiff Hidden Hills Management's (HHM's) Cross Motion for Summary Judgment [Dkt. # 71].

The fact-intensive case involves two related limited partnerships which own two low income housing projects: Hidden Hills (an apartment complex in University Place, purchased in 2002) and Parkway (an apartment complex in Federal Way, purchased in 2003). HHM is the general partner of the Hidden Hills Limited Partnership. 334th Place is the general partner of the Parkway Apartments Limited Partnership. Catherine Tamaro owns and manages both general partners, and manages both apartment complexes.

1 Defendant AMTAX¹ is the limited partner in each partnership. Alden Torch LLC² owns
2 and manages AMTAX. AMTAX invested in the partnerships to harvest the Low-Income
3 Housing Tax Credits (LIHTIC) associated with operating such projects. The two LPAs are
4 functionally identical. Each grants to the general partner an option to purchase the limited
5 partner's interest subject project at the end of the IRS "compliance³ period":

6 Subject to compliance with Section 42 of the Code and the rules of the agency, upon
7 completion of the Compliance Period, the Managing General Partner *shall* have the
8 option (the "Option") to purchase the interest of the Investor Limited Partner in the
9 real estate, fixtures and personal property of the Partnership (the "Interest") for a
10 period of twenty-four (24) months. *The Managing General Partner may exercise
the Option upon written notice to the Investor Limited Partner at any time after the
end of the Compliance Period (the "Option Period").* In the event the Managing
General Partner exercises the Option, it must pay to the Investor Limited Partner the
Option Price (as defined herein) in cash.

11 [Paragraph 7.4.J (Parkway agreement), Pritchard Decl. Dkt. # 53, Ex. A at 11(emphasis added)].

12 Under the LPAs, Tamaro operated each complex for the full compliance period, and
13 AMTAX passively benefitted from the tax credits and other tax benefits. Tamaro provided
14 annual audited financial statements to her limited partner. The general partners' efforts to force a
15 purchase of the limited partners' interests (at a favorable, low price), and the limited partners'
16 resistance to selling (and alternative effort to sell at a higher price) is the genesis of these parallel
17 disputes.

20 ¹ "Amtax Holdings 114 LLC" is the Hidden Hills limited partner, and "Amtax Holdings 169
21 LLC" is the Parkway limited partner. This Order will refer to the Limited Partners as the singular
"AMTAX."

22 ² Alden Torch purchased AMTAX in 2011.

23 ³ The LIHTC program is not indefinite, and the tax credits are "exhausted" after the [IRS]
24 Compliance Period, which is 15 years. The general partner's two-year unilateral purchase option
coincides with the expiration of the limited partner's tax credit benefit of ownership.

1 **I. BACKGROUND.**

2 HHM's option to purchase Hidden Hills from AMTAX matured in January 2017, a year
3 before 334th's option to purchase Parkway matured. As those dates approached, the parties
4 began discussing a voluntary sale of each project to the general partner. The Parkway
5 negotiations began earlier, in 2013, but ended (relatively amicably) without an agreement. The
6 partners cooperated on a successful re-finance of Parkway in 2015.

7 The partners' informal negotiations for the voluntary sale of AMTAX's interest in
8 Hidden Hills began in 2015. Hidden Hills was and is a more complicated project. It is in the
9 Tacoma Smelter Plume,⁴ and its topsoil was confirmed to be contaminated with "elevated" levels
10 of arsenic and lead⁵ from the Tacoma Asarco Smelter as early as 1998.

11 This topsoil contamination at the heart of the Hidden Hills dispute is not new news to the
12 partners or anyone else. HHM had engaged Environmental Partners (EPI) to perform Phase I
13 Environmental Site Assessment on Hidden Hills in connection with the general partnership's
14 initial purchase of Hidden Hills in 1999-2000, and EPI estimated then that the cost to clean up
15 the contamination would be about \$1 million. Because of the contamination, the partnership had
16 difficulty obtaining financing for its purchase. Its lender ultimately required it to place \$1.05

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⁴ The plume is expansive, reaching south to Thurston County, West to Mason County, and North
19 to the Snohomish County line. The parties have surely realized that Parkway is about as far from
20 the smelter site as Hidden Hills is, and it too is "within the plume." See EPI's January 3, 2017
Technical Memorandum, Pettit Dec. Ex. 64-2 at Ex. 10 attachment A.

21 ⁵ This fact does not appear to be disputed, but the actual level of contamination is not
22 highlighted, if it is in the extensive record. EPI's cost estimate is based on its "assumption" that
the levels are between 0.9 and 230 parts per million. *Id.* at 5.

23 Whatever the level is, HHM concedes Ecology has never undertaken (and is unlikely to ever
24 undertake) any enforcement action requiring any remediation of Hidden Hills. HHM's concern is
that *lenders* would balk at loaning money secured by a contaminated property, and might require
"No Further Action" letter from Ecology as a condition of doing so.

1 million into an interest-bearing environmental escrow account, under an agreement with the
2 “credit enhancer,” Fannie Mae. [Environmental Escrow Agreement, Pettit Decl. Dkt. # 64-1, Ex.
3 3 at p. 4]. The parties agreed to use these funds to remediate the property once Ecology
4 determined the required⁶ clean-up level. The partnership purchased Hidden Hills for \$8.9 million
5 in 2002. HHM claims that price was discounted due to the environmental contamination.

6 HHM also agreed to broadly indemnify its limited partner for the presence of hazardous
7 substances on the property:

8 4. Indemnity. The Indemnitor agrees to indemnify, hold harmless and defend the Company
9 from and against any and all claims, costs, litigation, proceedings, investigations, loss,
10 damage, liability, fine, penalty, assessment or expense, and/or loss, or deferment or delay
11 of distributions from Hidden Hills to the Company (collectively referred to as
12 “Environmental Liability”) arising from, or as a result of, or relating to, any Hazardous
Substance, Hazardous Substance Activity or violation of Environmental Laws or ADA
Laws, on the, or adversely affecting the, Property. Defense of the Company by
Indemnitor shall be provided by competent counsel of Indemnitor's choice, and the
Company shall reasonably cooperate in such defense.

13 [Environmental Indemnity & ADA Compliance Agreement, Pettit Decl. Dkt. # 64-1, Ex. 2 at p.
14 3].

15 HHM’s attorney during the partnership’s initial purchase of Hidden Hills, Robert
16 Sullivan, testifies that this provision “had nothing to do with any diminution of the property
17 value, as that issue was addressed at the time of acquisition by the seller’s reduction of the price
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21 ⁶ Ecology does not require any such cleanup. It does have a *Voluntary Cleanup Program* (VCP),
22 and successful participation in that program might entitle a property owner to a No Further
23 Action Letter. [See EPI’s January 3, 2017 Technical Memorandum, Pettit Dec. Ex. 64-2 at Ex.
24 10 attachment A]. EPI has not opined that Ecology will require the work it describes as a
condition of an NFA under the VCP.

1 paid by the partnership. The Indemnity Agreement applies if Ecology requires Amtax to clean-up
2 the property[.]” [Sullivan⁷ Dec. Dkt. # 72].

3 But Sullivan also concedes that the indemnity’s purpose was to shift the risk and cost of
4 any future environmental remediation from the limited to the general partner:

5 [T]he intent of the Indemnity Agreement was to allocate the financial risk for
6 environmental issues between the general and limited partners. Of specific
7 concern was whether Ecology would require a cleanup, and that the cost of the
8 cleanup might exceed the amount of escrowed funds[.] By requiring the general
partner to “indemnify hold harmless and defend” the limited partner against
Environmental Liabilities, the Indemnity Agreement shifted this financial risk to
the general partner for future clean-up.

9 *Id.*

10 In late 2015, HHM engaged CBRE to appraise Hidden Hills, apparently in preparation
11 for exercising its option. CBRE’s February 3, 2016 appraisal acknowledged the contamination
12 but did not alter its valuation of the project based on it, because it made the “extraordinary
13 assumption” that the Environmental Escrow Account (then about \$1.5 million) would cover the
14 cost of any required remediation. [Feb. 3, 2016 CBRE Appraisal, Blake Decl. Dkt. # 63-1, Ex. 6
15 at p. vii]. CBRE’s 2016 appraisal valued Hidden Hills at \$13,800,000.

16 AMTAX claims it did not know HHM had commissioned the 2016 CBRE appraisal, or
17 that it had been completed, until Tamaro sent it a copy in July 2016, five months before the end
18 of the compliance period. [Blake Decl. Dkt. # 63]. Prior to exercising her option (but after
19 receiving and sharing the first CBRE appraisal), Tamaro also engaged EPI to perform an updated
20 Phase I ESA on Hidden Hills. It did so on November 3, 2016 [November 3, 2016 EPI Phase I
21 ESA, Pettit Decl. Dkt. # 64-1, Ex. 8]. EPI’s report reflected that it was done in connection with
22 “a re-finance” of the property, acknowledged that the site was “in the plume,” and recited that it
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24 ⁷ AMTAX’s Motion to Strike Sullivan’s declaration is DENIED for purposes of this Motion.

1 had “elevated” levels of lead and arsenic. It did not quantify those levels and it did not claim that
2 a cleanup was or would be required.

3 Around the same time, Tamaro asked CBRE (Todd Henderson) to appraise the property a
4 second time.

5 The compliance period ended, and HHM’s option matured, on January 1, 2017. Two days
6 later, EPI sent HHM a “Technical Memorandum” as a follow-on to its November 3 Phase I ESA.
7 EPI estimated the cost of a cleanup of the Hidden Hills lead and arsenic contamination at \$1.5 -
8 \$2.5 million—assuming that remediation was required or desired. [January 3, 2017 EPI
9 Technical Memorandum, Pettit Decl. Dkt. # 64-2, Ex. 10]. HHM provided this document to
10 CBRE for consideration in its second appraisal.

11 The same day, AMTAX exercised its own contractual right (subject to the general
12 partner’s purchase option) to force the partners to sell Hidden Hills on the open market. [Hidden
13 Hills Partnership Agreement section 7.4.K, Pettit Decl. Dkt. # 64-1, Ex. 1 at 46]. HHM declined,
14 pointing to its option. AMTAX participated in the ensuing appraisal process, but continued to
15 push for such a sale even as the partnership devolved into litigation. It argues that Tamaro falsely
16 claimed to be interested in such a sale.

17 CBRE’s second, January 30, 2017 appraisal valued the property at \$13.0 million. Its
18 value included a reduction of \$2.5 million (the high end of the EPI cost estimate), and it did not
19 offset that hypothetical cost by the \$1.5 million escrow account balance, because it “understood”
20 that the account “was not transferrable in the event of a sale.” [CBRE January 30, 2017
21 Appraisal, Pettit Decl. Dkt. # 64-1, Ex. 12 at p. 1-2]. AMTAX claims the Escrow Agreement
22 expressly contemplates a sale.
23
24

1 HHM formally exercised its option in March 2017. Consistent with the partnership
2 agreement's provisions for determining the Hidden Hills option price, each party chose an
3 appraiser.

4 AMTAX selected Andy Noble of Cushman and Wakefield. C&W's April 2017 appraisal
5 of Hidden Hills acknowledged that the property was in the plume, and that it had reviewed EPI's
6 initial Phase I ESA (2001), but it concluded⁸ that "the sales of multifamily properties in the
7 subject's general vicinity are not being adversely impacted by the Tacoma Smelter Plume." Its
8 valuation therefore did not include any deduction for potential environmental remediation costs.
9 C&W appraised the Hidden Hills project at \$19.7 million. [April 27, 2017 C&W Appraisal,
10 Blake Decl. Dkt. # 63-1, Ex. 15].

11 HHM nominated CBRE's Todd Henderson, who was obviously familiar with the
12 property. Tamaro again provided Henderson EPI's recent Phase I ESA, and its Technical
13 Memorandum. CBRE's June 7, 2017 appraisal valued the property at \$14.05 million. [June 7,
14 2017 CBRE Appraisal, Blake Decl. Dkt. # 63-1, Ex. 19]. Like its January appraisal, CBRE's
15 appraisal reduced the bottom line value by the assumed cost of the hypothetically-required
16 remediation of the property.

17 In May, Tamaro had also asked a different CBRE Broker, Tim Flint, to provide a
18 "Broker's Opinion of Value (BOV)," in connection with her contemplated *sale* (as opposed to,
19 and presumably after, her forced purchase) of Hidden Hills. [See Pettit Decl. Dkt. # 64-2 at Ex.
20 18]. *One day* after CBRE provided HHM its \$14.05 million appraisal of Hidden Hills, CBRE
21 provided HHM a BOV opining that Hidden Hills was worth \$20.8 - 21.8 million [CBRE's June
22

23 ⁸ HHM argues that Noble later conceded that the potential for environmental remediation was
24 "material," though it is not clear he was aware of the nature of the contamination, the
Environmental Indemnity Agreement, or the Environmental Escrow Account.

1 8, 2017 BOV, Pettit Decl. Dkt. # 65 at Ex. 21]. The BOV did not address any environmental
2 contamination or remediation.

3 On June 19, Tamaro sent AMTAX CBRE's June 7 appraisal, but not CBRE's June 8
4 BOV, CBRE's January 30, 2017 appraisal, or EPI's January 3, 2017 Technical Memorandum.
5 She explained she was attempting to obtain a new loan for her purchase, and that her "lender will
6 require the owner to implement a remediation plan under Ecology's Voluntary Cleanup Program
7 as a condition of obtaining a new loan." [Blake Dec. Dkt. # 63 at Ex. 20]. Tamaro also claimed
8 that the C&W appraisal was flawed because it did not factor in the cost of the remediation she
9 claimed her lender would require.

10 The partnership agreement provided that if the two appraisers could not agree on the
11 value, they together would nominate a third appraiser to perform a third, independent, final and
12 binding appraisal:

13 Fair Market Value shall be determined by two independent MAI appraisers: one
14 selected by the Managing General Partner and on by the Investor Limited Partner.
15 *If such appraiser are unable to agree on the value, they shall jointly appoint a third*
16 *independent MAI appraiser whose determination shall be final and binding[.]*

17 [Hidden Hills Partnership Agreement, Pettit Decl. Dkt. # 64-1, Ex. 1 at para. 7.4.J (emphasis
18 added)].

19 The first two appraisers did not agree⁹ on a value, and they jointly nominated *two*
20 potential third appraisers, John Campbell of Colliers, and Jeremy Streufert of Kidder Mathews.
21 For reasons that remain unclear, these names were provided to HHM, but not to AMTAX.
22 *Tamaro* then selected Colliers/Campbell ("first on the list") to be the third appraiser.

23 _____
24 ⁹ AMTAX argues the LPA required them to try, and that they did not.

1 AMTAX claims Colliers was not aware that its role was to be the third, independent,
2 final appraiser. It is undisputed that Tamaro was Colliers' "point person" on the appraisal—
3 Colliers referred to her as "the client"—and she alone had contact with Colliers. HHM claims
4 AMTAX was free to similarly contact Colliers but did not do so.

5 In the summer of 2017, Tamaro again contacted EPI, this time to provide a "more
6 detailed remediation cost estimate" for Hidden Hills. EPI's August 8, 2017 Technical
7 Memorandum estimated the cost to remediate Hidden Hills at roughly \$3.75 million, which was
8 apparently calculated by adding a \$1.2 million (50%) "contingency" for "unknown or changed
9 conditions" on top of the high end of its prior estimate of \$1.5 - 2.5 million. [EPI's August 8,
10 2017 Technical Memorandum, Pettit Decl. Dkt. # 64-4, Ex. 35, at p. 6]. As with EPI's prior
11 estimates, this new estimate implicitly assumed that the remediation was required, or desired.
12 Tamaro provided this Technical Memorandum to Colliers, but not to AMTAX.

13 AMTAX claims it did not know Colliers/Campbell had been selected, or that Tamaro
14 "secretly" appointed the "independent" third appraiser. It claims Tamaro's conduct violated the
15 LPA, which required the two appointed appraisers (not HHM) to select the third, and that she
16 improperly interfered with the appraisal process, particularly by providing EPI's August
17 Technical Memorandum. AMTAX claims and demonstrates that Tamaro instructed Colliers' to
18 discount its appraisal by the EPI remediation cost estimate and Colliers did so.¹⁰

19 In any event, Colliers' October 2017 appraisal valued Hidden Hills at \$13,500,000.
20 [October 23, 2017 Colliers appraisal, Pettit Decl. Dkt. # 64-1, Ex. 33]. Colliers' valuation

21
22 ¹⁰ AMTAX catalogues a litany of Tamaro/HHM - Colliers contacts that are fundamentally at
23 odds with the notion of an "independent" appraisal. *See* Pettit Dec. Dkt. # 64-5, *see* AMTAX's
24 MSJ Dkt. # 62 at 13-14. After "ordering" the discount, Tamaro reviewed and commented on a
draft Colliers appraisal that was still \$3 million higher than version she asks the Court to declare
"independent, final, and binding" as a matter of law.

1 included a straight deduction for EPI's latest estimate of the cost of a hypothetical remediation of
2 the topsoil contamination:

3 The owner provided an estimate to remediate the contamination at \$3,760,450 which includes \$1,220,150 in
4 contingency. As a result, these costs are deducted from the indicated value.

5 [October 23, 2017 Colliers appraisal, Pettit Decl. Dkt. # 64-1, Ex. 33, at p. 92].

6 AMTAX refused to proceed with the sale.¹¹ In November 2017, it disputed the validity of
7 Collier's appraisal, threatened to remove HHM as the General Partner under the partnership
8 agreement, and demanded that HHM agree to either sell the property on the market, or buy
9 Hidden Hills based on the midpoint of the BOV CBRE provided Tamaro (\$21.3 million).

10 Two weeks later, HHM sued in state court, seeking to enforce its option and force a
11 purchase based on the third, independent, final and binding Colliers appraisal. AMTAX
12 purported to remove HHM as the general partner under the LPA. It did remove the state court
13 case here [Dkt. # 1], and asserted counterclaims for breach of contract, breach of fiduciary duty,
14 declaratory judgment as to the option price, and confirming or effectuating its removal of HHM
15 as the general partner. [Dkt. # 24]. It later added an indemnification counterclaim under the
16 Environmental Indemnity Agreement. [Dkt. # 37].

17 AMTAX claims that Tamaro and HHM violated the LPA by secretly and improperly
18 appointing Colliers, and by improperly interfering with the appraisal process. It also claims it has
19 since discovered that HHM violated its fiduciary duties and breached the LPA in various ways,
20 going back ten years. It claims HHM charged the partnership excess fees, paid them to family

21 ¹¹ The appraisal process sets the Fair Market Value, but the Option Price the General ultimately
22 pays is the result of a variety of additional calculations, reflecting the mortgage and other debits
23 and credits. The parties refer to these calculations as the "distribution waterfall," which is
24 detailed in the LPA. The parties also dispute how that waterfall applies to calculate the Option
Price. HHM seeks a judgment requiring it to pay AMTAX about \$1 million.

1 members, and failed to maximize rental rates, all as part of a long-term scheme to enrich herself
2 at the partnership's expense, and to purchase Hidden Hills (and Parkway) at a discount. [Dkt. #
3 37].
4

5 By the time 334th's option to purchase AMTAX's interest in Parkway matured in January
6 2018, the Tamaro/AMTAX relationship had plainly deteriorated beyond repair. 334th promptly
7 purported to exercise that option. AMTAX responded in March that it was evaluating the
8 "questionable activity" it had uncovered during the Hidden Hills dispute, regarding Tamaro's
9 management and operation of both general partnerships. It demanded that 334th cure its defaults
10 as a condition of moving forward on the option. 334th responded by sending AMTAX the CBRE
11 appraisal it had commissioned on Parkway, and sought to proceed with the appraisal process as
12 part of the buyout.

13 On May 8, AMTAX wrote 334th a letter accusing it of financial mismanagement and
14 other breaches of the LPA, claiming it had the right to remove 334th as the general partner, and
15 that as a result 334th did not have the right to exercise its option. [Pritchard Decl. Dkt. # 53-14,
16 Ex. N)]. The same day, 334th sought leave to amend its existing (HHM) complaint to include the
17 Parkway dispute. [Dkt. # 25] The request was granted [Dkt. # 32], and both disputes are now in
18 this case. 334th seeks a declaratory judgment on its unconditional right to exercise its option to
19 purchase Parkway. [Dkt. # 33].

20 AMTAX counterclaimed, claiming as it had on Hidden Hills that the general partner had
21 mismanaged the project, incurred excessive fees, and breached the Parkway LPA and its
22 fiduciary duties. It seeks a declaration that 334th cannot exercise its option, seeks to remove
23 334th as the general partner, and damages. [Dkt. # 37].
24

II. DISCUSSION

A. The pending Motions.

After a year of thorough discovery, the parties filed the three pending summary judgment motions.

AMTAX seeks summary judgment in the Hidden Hills dispute, on three points: (1) the Colliers' appraisal is not "independent, final and binding;" (2) any remediation costs are HHM's responsibility under the Environmental Indemnity Agreement, and the potential cost of a cleanup should not be deducted from Hidden Hills' value; (3) AMTAX effectively removed HHM as the general partner under the LPA for breaching her duties to it and the partnership. [Dkt. # 62].

HHM also seeks summary judgment in the Hidden Hills dispute, on (1) its right to exercise its option to purchase at the Colliers' appraised value, (2) the inapplicability of the Environmental Indemnity Agreement, (3) AMTAX's claim that it effectively removed HHM as the Hidden Hills general partner, and (4) AMTAX's counterclaims. [Dkt. # 71]

334th seeks summary judgment [Dkt. # 52] on two issues that it claims would resolve at least the Parkway portion of this case: First, it asks the Court to determine as a matter of law that it is entitled to and did exercise its unconditional option to purchase Parkway, and that AMTAX's "retaliatory" effort to remove it as general partner was not effective to terminate that right.

Second, it claims that AMTAX's counterclaims for excessive fees, mismanagement and breaches of the partnership agreement and 334th's fiduciary duties are all based on the audited financial statements that 334th timely provided over the years. It argues that all the claims are time-barred, that AMTAX is estopped from asserting them, and that some of them (the failure to maximize rents) are barred by the Business Judgment Rule. It seeks summary dismissal of all Parkway counterclaims.

1 The excellent briefing and voluminous record demonstrate that this is an intensely factual
2 dispute. As a result, many of the issues will require a trial. But on two issues, the facts are not
3 reasonably disputed, and their effect can be determined as a matter of law.

4 **B. Summary Judgment Standard.**

5 Summary judgment is proper “if the pleadings, the discovery and disclosure materials on
6 file, and any affidavits show that there is no genuine issue as to any material fact and that the
7 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). In determining whether
8 an issue of fact exists, the Court must view all evidence in the light most favorable to the
9 nonmoving party and draw all reasonable inferences in that party’s favor. *Anderson v. Liberty*
10 *Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).

11 A genuine issue of material fact exists where there is sufficient evidence for a reasonable
12 factfinder to find for the nonmoving party. *Anderson*, 477 U.S. at 248. The inquiry is “whether
13 the evidence presents a sufficient disagreement to require submission to a jury or whether it is so
14 one-sided that one party must prevail as a matter of law.” *Id.* at 251-52. The moving party bears
15 the initial burden of showing that there is no evidence which supports an element essential to the
16 nonmovant’s claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has
17 met this burden, the nonmoving party then must show that there is a genuine issue for trial.

18 *Anderson*, 477 U.S. at 250. If the nonmoving party fails to establish the existence of a genuine
19 issue of material fact, “the moving party is entitled to judgment as a matter of law.” *Celotex*, 477
20 U.S. at 323-24. There is no requirement that the moving party negate elements of the non-
21 movant’s case. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). Once the moving
22 party has met its burden, the non-movant must then produce concrete evidence, without merely
23 relying on allegations in the pleadings, that there remain genuine factual issues. *Anderson*, 477
24 U.S. 242, 248 (1986).

1 **C. Hidden Hills.**

2 **1. The Colliers' appraisal was not independent, and it is not final or binding.**

3 AMTAX asks the court to determine as a matter of law that the Colliers' appraisal was
4 not conducted in accordance with the partnership agreement's requirements. It correctly argues
5 that such contracts must be "strictly construed," and that the Colliers' appraisal does not meet the
6 partnership agreement's strict requirements in at least two ways, as a matter of law.

7 AMTAX claims that the first two appraisers were contractually required to appoint a
8 (single) third, independent appraiser to conduct a final, binding one, *if* they "could not agree" on
9 a value. It also claims HHM and Tamaro improperly interfered with the independent appraisal
10 process and that the Colliers appraisal is not the final binding appraisal to be used for the option
11 price—even disregarding the fact that it failed to account for the Environmental Indemnity
12 Agreement and the Environmental Escrow Account. AMTAX accurately claims that HHM
13 instead took a "second bite at the apple" in appointing and manipulating its own appraiser,
14 instead of the independent process the contract plainly required.

15 HHM also seeks summary judgment on this issue. It argues that the appraisal process was
16 followed as a matter of law. It claims that first two appraisers "could not agree" (as demonstrated
17 by the difference in their valuations) and claims that even AMTAX's own appraiser, Noble (of
18 C&W), thought Campbell was "a fine choice." It claims there was "nothing secret" about the
19 selection process, and relies on the Colliers appraisers' (Campbell and Hutsell's) testimony that
20 they were "not influenced" by HHM. It claims the Colliers appraisal controls as a matter of law
21 and asks the Court to order a sale based on that value.

1 It is true that first two appraisers did not agree, but it is not at all clear that they tried to
2 reconcile their differences.¹² More importantly, they did not “jointly appoint” an independent
3 third appraiser; they gave Tamaro two names, and she picked one. That’s not the same thing, as a
4 matter of law.

5 Tamaro’s claim that she did not know Campbell or Colliers is not an answer to the claim
6 that she picked the appraiser. Tamaro’s various excuses and explanations for why she fed the
7 appraiser secret information, or why she solicited an even higher EPI estimate and instructed the
8 appraiser to use it as straight value reduction, or failed to inform Colliers what its role really was,
9 are not enough to avoid the clear legal conclusion that the appraisal was far from “independent.”
10 AMTAX has amply demonstrated that the process was tainted beyond salvation, as a matter of
11 law. [See Generally, Pettit Dec. Dkt. # 64-5; AMTAX’s MSJ Dkt. # 62 at p. 12 n. 5 - p. 14.].

12 AMTAX’s motion for Summary Judgment on this single issue is GRANTED and HHM’s
13 parallel Motion on it is DENIED. Colliers was not jointly appointed by the first two appraisers,
14 its appraisal was not independent, final or binding, and it is not the valuation for determining the
15 option price as a matter of law.

16 **2. HHM broadly agreed to Indemnify AMTAX for “environmental liability.”**

17 HHM argues that the Environmental Indemnity Agreement was intended to apply if and
18 only if a third party made a claim against the partnership as the result any environmental
19 contamination, including the anticipated claim that Ecology would require the owners to
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21 ¹² The LPA pointedly made the first two appraisers’ “settlement” effort (and the failure of that
22 effort) a precondition to going through the process again with a third, independent appraisal. The
23 CBRE - C&W gap was about double the high end of EPI’s then-estimated remediation cost,
24 which CBRE deducted and C&W did not. It is plausible—it might even be likely—that two
reasonable appraisers could meet somewhere in the middle, and avoid the third, far more
contentious appraisal process.

1 remediate the arsenic and lead on Hidden Hills. It claims it was not intended to compensate
2 AMTAX for any diminution in value based on the presence of the contamination.

3 AMTAX argues the Environmental Indemnity should be interpreted as any other
4 contract, to give effect to the parties' intentions. It claims that an indemnity contract should
5 "receive a reasonable construction so as to carry out, rather than defeat, the purpose for which it
6 was executed." *See McDowell v. Austin Corp.*, 105 Wn.2d 48, 53-54 (1985) (citations omitted).

7 The goal of contract interpretation is to "ascertain the intention of the parties." *Berg v.*
8 *Hudesman*, 115 Wash.2d 657, 663 (1990) (quoting Corbin, *The Interpretation of Words and the*
9 *Parol Evidence Rule*, 50 Cornell L. Quar. 161, 162 (1965), 4. S. Williston, *Contracts* 601, at 306
10 (3d ed. 1961)). In Washington, courts determine the parties' intent by examining the contract's
11 objective manifestations. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wash.2d 493,
12 503 (2005). Words should be given their ordinary, usual and popular meaning "unless the
13 entirety of the agreement clearly demonstrates a contrary intent." *Hearst Communications, Inc.*,
14 154 Wash.2d at 504. Subjective intent is generally irrelevant if the intent can be determined
15 from the actual words used. *Hearst Communications, Inc.*, 154 Wash.2d at 504.

16 In determining the objective intent, courts may refer to extrinsic evidence for the
17 "meaning of specific words and terms used." *Hearst Communications, Inc.*, 154 Wash.2d at 503
18 (quoting *Hollis v. Garwall, Inc.*, 137 Wash.2d 683, 695-96 (1999)). Extrinsic evidence may be
19 relied on even in the absence of ambiguity. *See Berg v. Hudesman*, 115 Wash.2d 657, 669
20 (1990). Extrinsic evidence may include: "(1) the subject matter and objective of the contract, (2)
21 all the circumstances surrounding the making of a contract, (3) the subsequent acts and conduct
22 of the parties, and (4) the reasonableness of respective interpretations urged by the parties."
23 *Hearst Communications, Inc.*, 154 Wash.2d at 502 (citing *Berg v. Hudesman*, 115 Wash.2d 657,
24

1 667 (1990)). Extrinsic evidence may not be used to “show an intention independent of the
2 instrument” or to “vary, contradict, or modify the written word.” *Id.*

3 HHM’s argument on the operation and application of the Environmental Indemnity is not
4 persuasive. First, the Environmental Indemnity Agreement does not say what HHM now claims
5 it means; it was unambiguously, intentionally broad. It contained no limitation to actual claims
6 by third parties.

7 More importantly, HHM has consistently conceded that if Ecology required a cleanup,
8 the Environmental Indemnity Agreement would require HHM to pay for it. Sullivan also
9 concedes that his client intended to shoulder the risk of any environmental remediation. HHM
10 claims that because Ecology has *not* required a cleanup, the Environmental Indemnity
11 Agreement does not apply, and it can instead place the entire hypothetical cost of that very same
12 cleanup on AMTAX.

13 AMTAX’s argument is persuasive: if HHM is permitted to ignore the Environmental
14 Indemnity, to effectively charge some hypothetical cost to AMTAX, and to keep the
15 Environmental Escrow fund, it will own Hidden Hills without performing any remediation. At
16 the same time, AMTAX “will be stuck paying for a cleanup that never happens on a property it
17 no longer owns.” *See* Dkt. # 62 at 25.

18 HHM’s reading of the Environmental Indemnity Agreement is unfair and unwarranted. It
19 is contrary to the parties’ admitted intent, and to the words they used. It makes no sense to argue
20 that the Environmental Indemnity Agreement is not triggered because Ecology has not
21 “required” a cleanup, but to nevertheless claim that HHM’s option purchase price should be
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1 discounted by the ever-increasing estimated cost¹³ of a cleanup everyone knows will never occur,
2 because it might be “required” by HHM’s lender.

3 HHM is in fact claiming that a third party “requires” a cleanup: it claims that the lenders
4 it has approached to fund its purchase option will require a cleanup as a condition of funding
5 HHM’s purchase.

6 HHM has also suggested that a potential buyer might require a cleanup, but that isn’t
7 what any of the appraisals say, and it certainly isn’t what CBRE’S \$20.8-21.8 million BOV says.
8 There is evidence in the record of one potential buyer, HHM, and while it wants the potential
9 cost of remediation to be high (to drive down Hidden Hills value and its purchase price), there is
10 no evidence that it intends to actually remediate the property, or that it could or would hire EPI
11 to implement the “Cleanup Action Plan” described in its Technical Memoranda. If it *did* clean up
12 Hidden Hills, before or after it purchased, it would have to pay for it. It makes no sense to inflate
13 that cost as much as possible, and charge it to the reluctant, indemnified seller. The parties did
14 not agree that that was how it worked, as a matter of law.

15 There is no question of fact on this claim. AMTAX’s Motion for Summary Judgment on
16 its claim that the Environmental Indemnity Agreement requires HHM to bear the risk of any
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18 ¹³ EPI’s August 8 Technical Memorandum provides no explanation for its “estimated” costs, and
19 does not suggest that anyone will require any such efforts. It acknowledges that the first step in
20 approaching a contamination problem is to perform a “Remedial Investigation,” and the second
21 is to perform a “Feasibility Study” (RI/FS). The purpose of the latter is to “develop and evaluate
22 cleanup action alternatives prior to implementation and (then) select the model remedy most
23 appropriate for the subject property.”

24 Once Ecology signs off on that, “*then* the Cleanup Action Plan *will be* developed.” [See EPI
August 8, 2017 Technical Memorandum, Pettit Dec. Ex. 64-4 at 7 (emphasis added)]. EPI’s cost
estimate—for a Cleanup Action Plan it has not developed, based on an RI/FS it has not
performed, based on cleanup “requirements” Ecology has not imposed—is pure speculation. The
costs EPI developed for HHM’s appraisal process do not reflect any real or required cleanup, and
they have nothing to do with the Fair Market Value of Hidden Hills.

1 environmental contamination claim or loss is GRANTED. Any future, third, independent, final
2 and binding appraisal will be conducted without reference to the contamination, and without
3 reference to EPI's various estimates.

4 HHM's Motion for Summary Judgment on this issue is DENIED.

5 **3. AMTAX'S right to remove HHM as general partner presents a question of fact.**

6 AMTAX argues that HHM and Tamaro's "Colliers" conduct—demonstrably, even
7 brazenly contrary to the letter and spirit of the contract's appraisal process—violated the
8 agreement, and HHM's fiduciary duties to the partnership. It argues it therefore had the right to
9 remove HHM as general partner under the LPA, seeks a ruling that it effectively did so, and that
10 the effect is to preclude HHM's option as a matter of law.

11 The LPA gives the limited partner the right to remove the General if it violates its
12 fiduciary duties to the partnership:

13 (2) the General Partners, or any of them, shall have violated any
14 rights, powers, duties, representations or warranties as set forth in Article VII
15 herein or shall have violated any material provision of this Agreement, and such
16 misconduct or failure to exercise reasonable care can reasonably be expected to
17 cause economic detriment to the Partnership or the Project or defaulted on a
guarantee herein or the timely payment of a Penalty Payment or violated any
material provision of applicable law; or

18 [Hidden Hills LPA § 4.5, Pettit Dec. Dkt. # 64-1 at 25]. "Article VII" describes the General
19 Partners' fiduciary obligations to the partnership. *Id.*

20 HHM argues that it effectively exercised its option to purchase Hidden Hills, because the
21 LPA imposed only two conditions on that right, and they were met. At the time HHM exercised
22 its option, AMTAX had not claimed it was in default, had not claimed it breached its fiduciary
23 duties, and had not sought to remove HHM. It claims AMTAX went along with the appraisal
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1 process, until it did not like the result. HHM argues AMTAX's subsequent removal effort was
2 ineffective, as a matter of law.

3 HHM argues that once it exercised the option, it was entitled to treat AMTAX as an
4 arms-length adversary with respect to the purchase price. It correctly claims that under
5 Washington law, "a partner does not violate a duty or obligation under this chapter or under the
6 partnership agreement merely because the partner's conduct furthers the partner's own interest."
7 *See* RCW 25.05.165(5); *J&J Telecom v. AT&T Wireless Servs. Inc.*, 169 P.3d 823 (2007) (other
8 citations omitted). This principle and these authorities do not foreclose the possibility, though,
9 that something more could be a violation of such duties.

10 HHM's position is difficult to square with HHM's claim that its role as general partner
11 entitled Tamaro to be Colliers contact person, on the *partnership's* behalf. A reasonable fact-
12 finder could find that HHM was not acting on the partnership's behalf, and that its efforts had the
13 intended effect of "causing economic detriment to the Partnership or the Project"—Tamaro was
14 driving the value of the partnership's only asset, Hidden Hills, for her own benefit. HHM's
15 argument that Washington law requires a *seller* to disclose environmental contamination to a
16 buyer (or face a rescission or fraud claim) is not persuasive support for its claim that as a *buyer* it
17 was required to solicit, inflate, and disclose EPI's cost estimates to an independent appraiser. *See*
18 RCW 654.06.101(7).

19 The Hidden Hills Limited Partnership did not wind-up or dissolve, and the duties the
20 Hidden Hills LPA imposed did not end, when HHM exercised its unilateral option. Instead, that
21 initiated a process under the LPA, ultimately leading to a valuation, the distribution waterfall,
22 and the payment of cash for AMTAX's interest. If and to the extent HHM is arguing that it had
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1 no further obligations to the partnership or to AMTAX, or that its exercise prevented the limited
2 from removing it regardless of its conduct, it is wrong as a matter of law.

3 Th Court's determination (above) that HHM improperly interfered with the appraisal
4 process necessarily leads to the conclusion that HHM's Motion (for a declaration that the
5 appraisal process is complete) must be DENIED. Its summary judgment motion on AMTAX's
6 Hidden Hills counterclaims must also be DENIED.

7 But that does not mean that AMTAX's own Motion for Summary Judgment on its
8 counterclaims must be granted, or that its removal was warranted or effective to preclude the
9 option as a matter of law. The corrective for the tainted appraisal may be as simple as re-doing
10 the appraisal process. Or perhaps it damaged the partnership in a way that will require HHM to
11 compensate AMTAX. AMTAX's counterclaims, and its purported removal of HHM as general
12 partner, present complicated and hotly-contested factual disputes requiring a trial.

13 AMTAX's Motion for Summary Judgment on the efficacy of its removal notice, and for
14 a judgment in its favor on its Hidden Hills counterclaims is DENIED. HHM's Motion for
15 Summary Judgment on its claim that the removal is ineffective as a matter of law, and for
16 dismissal of the Hidden Hills counterclaims, is similarly DENIED.

17 **D. Parkway.**

18 **1. 334th effectively initiated the appraisal process, but that does not preclude its**
19 **removal under the partnership agreement.**

20 The Parkway dispute is less complicated than the Hidden Hills dispute, but they overlap.
21 334th's motion seeks a declaration as a matter of law that it effectively exercised its option, and
22 that AMTAX's subsequent effort to remove it is therefore not effective.

23 As it did above, the Court views these as separate questions. One is whether 334th was
24 required to "not be in default" as a pre-condition of even attempting to exercise its unilateral

1 option. The second is whether that unconditional exercise precludes AMTAX from later
2 removing 334th during the appraisal process, for later-discovered or later-committed breaches
3 (before the buy-out is complete and the partnership is wound up).

4 334th also seeks summary judgment on AMTAX's Parkway counterclaims, arguing that
5 they are time barred, that AMTAX is estopped from asserting them (because it timely received
6 and was silent about the audited financial statements) and they are barred by the Business
7 Judgment Rule.

8 AMTAX argues that the Court should imply a "no default" precondition on to the option,
9 where it would be fundamentally unfair to permit the optionee to drive down the partnership's
10 value and then buy it at a discount, while removing the limited partner's primary recourse—
11 removal of the general for just that sort of breach.

12 As to the first issue, 334th correctly claims that the option's plain language does not place
13 any pre-conditions¹⁴ on its right to exercise its option. 334th relies largely on *Lakeside Mngmt.,*
14 *Inc. v Care Realty LLC*, 2009 WL 903818 (D. N.H. 2009)). *Lakeside* held that a tenant was
15 entitled to exercise its option to renew despite the non- or late payment of rent, because the lessor
16 had accepted its payments for years and was estopped from invoking those failures to prevent the
17 option. 334th argues that, unlike the agreement there, its option was not conditioned on the
18 absence of default.

19 AMTAX argues that the Court should imply the optionee's freedom from default as an
20 additional condition on the valid exercise of the option. It argues that, whatever *Lakeside* held on
21 its facts, under Washington law a tenant who has "chronically failed" to pay rent is not entitled to
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23 ¹⁴ The option is expressly conditioned only on the property's compliance with IRS rules and the
24 end of the compliance period. There is no dispute that these conditions were met.

1 exercise an option to renew the lease, because it would be “fundamentally unfair” to require the
2 lessor to honor the exercise where the tenant was in default. *Citing Hindquarter Corp. v.*
3 *Property Development Corp.*, 95 Wn.2d 809, 631 P.2d 923 (1981).

4 The *Hindquarter* lessor was aware its tenant was in default, and had so claimed, by the
5 time the tenant sought to renew. AMTAX had claimed that *HHM*’s conduct violated the Hidden
6 Hills LPA, and now claims it has since discovered that 334th similarly worked to drive down the
7 value of Parkway in an effort to purchase it on the cheap. But AMTAX did not claim 334th was
8 in default or seek to remove 334th for failure to cure those defaults, until after the option was
9 exercised.

10 334th’s Motion for Summary Judgment is GRANTED to the limited extent that
11 AMTAX’s claimed “defaults” do not preclude it from exercising the option and initiating the
12 appraisal process.

13 But 334th’s motion for a declaration that its option exercise precluded AMTAX as a
14 matter of law from later removing it under the LPA (based on breaches 334th committed after its
15 notice, or which AMTAX discovered before the buyout was complete), is DENIED. The validity
16 and efficacy of the removal will be resolved at trial.

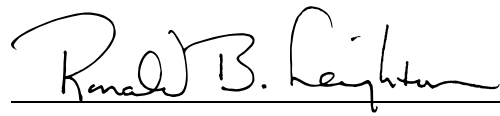
17 **2. AMTAX’s counterclaims and 334th’s affirmative defenses present questions of fact.**

18 334th seeks summary judgment on AMTAX’s Parkway counterclaims, arguing all are
19 barred by the six-year limitations period applicable to written contracts, and the three-year
20 limitations period (subject to the discovery rule) for tort claims. It also argues that AMTAX is
21 estopped from raising these claims, because it long ago received and accepted audited financial
22 statements which it only later scrutinized to discover allegedly unauthorized fees. It claims that
23 some of its decisions (the alleged failure to maximize rents, specifically) by the Business
24 Judgment Rule.

1 Even if they are limited by time, some of AMTAX's counterclaims are timely (and
2 evidence of earlier misconduct may be admissible, even if it is not actionable). 334th's defenses
3 to the counterclaims (like the counterclaims themselves) depend on the resolution of disputed
4 facts. 334th's Motion for Summary Judgment on AMTAX's counterclaims is DENIED.

5 IT IS SO ORDERED.

6 Dated this 2nd day of May, 2019.

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Ronald B. Leighton
United States District Judge